NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

JOSEPH CROCCO,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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February 24, 2022

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW

Whether the Court of Appeals erred when it held that the district court's erroneous determination that Petitioner was a career offender, based on Petitioner's 2012 Virginia conviction for possession of marijuana with intent to distribute, was not plain error. The error was plain and obvious because under any of the current methodologies employed by various circuit courts for defining "controlled substance offense" when applying the categorical approach mandated by this Court, Petitioner's Virginia state conviction did not qualify as a controlled substance offense" under U.S.S.G. §4B1.1(a)(3).

Whether the Court of Appeals abused its discretion when it held that Petitioner's argument raised in his supplemental brief based on a case that court decided after argument in the present case, was waived.

Whether any error can be plain or obvious if a circuit conflict exists on a question, and the law is unsettled in the circuit in which the appeal was taken. The Tenth Circuit holds that an error can be plain or obvious even where there a circuit conflict exists, and the law is unsettled in the circuit in which the appeal is taken. The First Circuit holds that an error can never be plain or obvious if there is a split in the circuits and the question is unsettled in the circuit in which the appeal is taken. This case is a perfect vehicle for addressing this split in the circuits.

TABLE OF AUTHORITIES

CASES **PAGES**

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The Petitioner, Joseph Crocco, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on September 27, 2021.

OPINION BELOW

On September 27, 2021, the Court of Appeals entered its Opinion affirming the Petitioner's sentence. Judgment is attached at Appendix 1.

JURISDICTION

On September 27, 2021, the United States Court of Appeals for the First Circuit entered its Opinion affirming Petitioner's sentence. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V:

> No person shall…be deprived of life, liberty, or property without due process of law…

STATEMENT OF THE FACTS

Offense Conduct

On February 5, 2018, Petitioner was arrested on a fugitive from justice charge (PSR, 10/22/19, at p. 3, para.1). On April 6, 2018, a grand jury returned an indictment charging Petitioner with Bank Robbery in violation of 18 U.S.C. § 2113(a). The government alleged that on December 21, 2017, Petitioner entered a Service Credit Union located in a Walmart Super Center in Hinsdale, New Hampshire and handed the teller a note claiming to have a bomb which he would detonate. As he handed the teller the note, he put his hand on his side near what appeared to be a cell phone case. The teller handed over $2,709. Petitioner was arrested based on the police discovery of a car stuck in the snow near the scene of the robbery which was registered in Petitioner's girlfriend's name and contained a credit card in Petitioner's name. (PSR at 4, para. 8, 9).

On September 25, 2018, Petitioner was convicted after trial of Count One, Bank Robbery. (PSR, at 3, para. 3).

Sentencing Hearing

The sentencing hearing was held on October 30, 2019. Prior to sentencing Probation recommended that Petitioner be sentenced as a career offender. The career offender designation was based on a 25-year-

old voluntary manslaughter conviction when Petitioner was 18 years old and a 2012 state of Virginia conviction for possession with intent to distribute marijuana. (Sentencing at 11, 12, PSR at 14, para. 47). Probation calculated Petitioner's total offense level as 32 and his criminal history category as IV (PSR at 26, para. 83).

Counsel for Petitioner argued that Petitioner should be sentenced without the career offender enhancement. Petitioner did not object to the career offender designation but argued that the career offender guideline overstated his criminal history and that a sentence within the career offender guideline was substantively unreasonable. (Sentencing at 4, 13) Counsel assailed manslaughter career offender predicate on the age of the conviction. The voluntary manslaughter was 25 years previous, and Petitioner was an 18-year-old teenager. The conviction for possession with intent to distribute was for an amount between a half an ounce and five pounds. There is no in formation in the PSR about the quantity possessed by Petitioner, but counsel argued Petitioner effectively was sentenced to a year in jail and a year of probation with a suspended sentence conditioned on good behavior. Counsel noted that from 2011 until 2018 Petitioner had no criminal activity whatsoever. (Sentencing 11-13)

Counsel argued that Petitioner had a long history of serious mental health disorders, (suicidality after convictions, personality disorders, schizoaffective disorder, and bipolar disorder with anxiety, major depression, and PTSD) (Sentencing at 14, 24). Counsel noted that while very serious, the instant offense was not a typical bank robber. No one was harmed, no weapon was displayed, possessed, or brandished. The robbery was completed in a few minutes, without injury to anyone and a small amount of money was taken (Sentencing at 17-19). Counsel also argued that Petitioner had a horrific upbringing. He was the victim of domestic violence and abuse throughout his childhood. Petitioner also suffered from PTSD, from his years in prison in North Carolina, where Petitioner was stabbed and assaulted in prison. Petitioner was the repeated victim of violence, he was shot in the face, stabbed in the face, had his throat cut and was shot a second time on the street. (Sentencing at 17).

The court found Petitioner to be a career offender, with a total offense level of 32 and his criminal history category was VI, resulting in a guideline range of 210-240 months (240 months being the statutory maximum for Petitioners count of conviction). (Sentencing at 6). However, the court agreed that Petitioner had a long history of serious mental health disorders, (Sentencing at 14, 24). The court also agreed that “it was a very quick

robbery and no one was harmed and there were no weapons displayed" (Sentencing at 19). The court also considered the extraordinary abuse Petitioner was subjected to as a child. (Sentencing at 32). The court noted that the career offender designation increased Petitioner's sentence, at the low end of the range, by 11 years. (Sentencing at 8). Without the career offender designation Petitioner's total offense level was 24 and his criminal history category was IV, resulting in a guideline range of 77-96 months. (Sentencing at 4). The court varied downward from the career offender guideline range and sentenced Petitioner to term of imprisonment of 144 months, a supervised release term of 3 years, a special assessment of $100 and restitution in the amount of $2,709. (Sentencing Transcript, 9/30/19, at p. 31 hereinafter Sentencing at___]).

Court of Appeals

On appeal, Petitioner reiterated the arguments his trial counsel made at sentencing, but also argued for the first time that Petitioner's prior state of Virginia conviction for possession with intent to distribute marijuana was not a "controlled substance offense" under USSG § 4B1.1(a)(3) and therefore under the categorical approach, the district court erred in holding it was a predicate for career offender designation. (United States v. Crocco, 15 F.4th 20 (1st Cir.2020), 19-214-Appellant's Brief, 7/21/2020, at page 11).

Petitioner argued that at the time of his sentencing and at the time of the predicate conviction, marijuana was no longer a controlled substance under Virginia law because it was removed from the Virginia controlled-substance schedule and criminalized under a separated statute. (Appellant's brief at 15-16).

In a supplemental brief following the First Circuit's decision in United States v. Abdulaziz, 998 F.3d 519 (1st Cir. 2021), Petitioner argued that his 2011 Virginia state conviction did not count as a predicate controlled substance offense because, under the categorical approach, Petitioner could have been convicted for hemp distribution, which was not a controlled substance, under either federal or Virginia state law, when Petitioner was sentenced in 2019. (Appellant's Supplemental Brief at 7-8).

The Court of Appeals held that while it is probable that the district court would have determined that Petitioner was not a career offender because his Virginia conviction was not for a "controlled substance", Petitioner having not raised the issue in the district or appeal court, could not establish plain error nor sufficient reason to excuse waiver. United States v. Crocco, 15 F.4th 20, 21, 23 (1st Cir. 2021).

Utilizing the categorical approach, the First Circuit stated Petitioner's claim could not be determined because the First Circuit had not addressed

the issue of whether a "controlled substance" was defined by state or federal law. Crocco at 21-22. The Court noted that the Second, Fifth and Ninth Circuits refer to the federal Controlled Substance Act (CSA), 21 U.S.C. 801 et seq., to determine if a substance is a "controlled substance" under §4B1.2 (b) and the Fourth, Seventh and Eighth Circuits refer to natural language and state law to supply the definition of "controlled substance". Crocco at 23. The Court held that Petitioner could not establish plain error because "as a general principle, if a question of law is unsettled in this circuit, and a conflict exists among other circuits, any error in resolving the question will not be "plain or obvious" Crocco, at 24, citing United States v. Lewis, 963 F.3d 16, 27 (1st Cir.2020).

Although the First Circuit refused to decide the issue in the present case, "due to [a] myriad unanswered, unbriefed questions." Crocco, at 25, the court nonetheless explored at length the question of whether state or federal law controlled the definition of "controlled substance". (Crocco, 22-25. The court concluded that the using the federal definition made sense because "we are interpreting the federal sentencing guidelines and utilizing the categorical approach" and using the state law definition of controlled substance abuse was "fraught with peril" Crocco at 23-24. Moreover, the court acknowledged that "The career offender designation can have

significant implications in setting the base guideline range" and in the present case, the career offender designation increased, almost threefold, Petitioner's guideline range. Crocco, at 24, n.4. The court also stated, twice, that Petitioner's most likely would have prevailed had he raised the issue in district court. Crocco at 21, 23.

REASON FOR GRANTING THE WRIT

I. The Court of Appeals erred when it held that the district court's erroneous determination that Petitioner was a career offender, based on Petitioner's 2012 Virginia conviction for possession of marijuana with intent to distribute, was not plain error. The error was plain and obvious because under any of the current methodologies employed by various circuit courts for defining "controlled substance offense" when applying the categorical approach mandated by this Court, Petitioner's Virginia state conviction did not qualify as a controlled substance offense" under U.S.S.G. §4B1.1(a)(3).

Introduction

Where the district court incorrectly calculates a Petitioner's guideline sentencing range a significant procedural error occurs which requires resentencing. Molina-Martinez v. United States, 578 U.S. 189 (2016), United States v. Alfas, 785 F.3d 775, 779 (1st Cir. 2015). Although Petitioner did not preserve the issue in district court the error was plain. United States v. Olano, 507 U.S. 725, 734 (1993) (plain error review requires an error that is plain and that affect[s] substantial rights…and the error seriously affects the fairness, integrity, or public reputation of judicial proceedings).

In the present case, Petitioner was sentenced as a career offender based on two predicate convictions, one of which, the 2012 Virginia conviction for possession of marijuana with intent to distribute, was not a

valid predicate for the career offender enhancement because it was not a "controlled substance offense" as that term is defined in the career offender enhancement. U.S.S. G. § 4B1.2(b). At the time of Petitioner's Virginia conviction, Virginia criminalized possession of hemp. Va. Code Ann. § 18.2-248.1 (2006). At the time of Petitioner's federal sentencing in the instant case, both the state of Virginia and federal law decriminalized hemp and it no longer qualified as a "controlled substance". Agricultural Improvement Act, Pub. L. 115-334, 132 Stat. 4490, (2018); Va. Code Ann. §18.2-247(D) (as amended by 2019 Va. Acts ch. 653). Moreover, at the time of Petitioner's prior state conviction, Virginia did not categorize marijuana offenses as "controlled substance" offenses. Compare Va. Code Ann. § 18.2-248, and § 18.2-248.1.

Utilizing the categorical approach, the elements of the prior conviction, at the time of that conviction, are compared with the elements of the federal enhancement provision at the time of sentencing for the instant offense. McNeill v. United States, 563 U.S. 816, 131 S.Ct. 2218, 180 L.Ed.2d 35 (2011) (the elements and penalties attached to the offense underlying a previous conviction are locked in as of the time of that conviction). In the present case, the sentencing enhancement provisions defined a predicate "controlled substance offense" as an "offense" that

among other things "prohibits the …possession of [with intent to distribute] a controlled substance". U.S.S. § 4B1.2(b). While it is true that the meaning of the phrase "controlled substance" is undecided in the First Circuit, in the present case, every iteration of that phrase, every possible definition of that phrase, is narrower than the elements of Petitioner's 2012 Virginia conviction. Therefore, Petitioner's Virginia conviction is not a valid predicate for a career offender enhancement. The error is plain because there can be no disagreement among jurists that Petitioner prevails under any definition of "controlled substance". Johnson v. United States, 529 U.S. 461, 468(1997) (It is enough that an error be plain at the time of appellate consideration). Puckett v. United States, 556 U.S. 129, 135 (2009) (an error is plain if it is clear or obvious rather than subject to reasonable dispute)

Argument

To be classified as a career offender under U.S.S. § 4B1.1 a defendant must have sustained "at least two prior felony convictions of either a crime of violence or a controlled substance offense". U.S.S. § 4B1.1(a). A "controlled substance offense" is an offense under state or federal law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled

substance…or the possession of a controlled substance… with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b).

When determining whether a prior conviction qualifies as a career offender predicate, courts employ the categorical approach. The categorical approach compares the elements of the prior offense (as it existed at the time of that conviction) with the Guidelines description of "controlled substance offense". Crocco, 15 Fed. 4th at 22.[1] The conviction qualifies as a predicate only if every possible violation of the statute fits within the enhancement definition. Descamps v. United States, 570 U.S. 254, 261(2013). The Guidelines define a "controlled substance offense" as an offense under state or federal law that prohibits a number of specific actions involving a "controlled substance" Crocco at 22. Unfortunately, the Guidelines did not define the term "controlled substance". Id.

Various Circuit Courts have reached different conclusions concerning the definition of "controlled substances" in the federal guidelines. The Eighth, Seventh and Fourth Circuits define "controlled substance" with reference to the ordinary meaning of the words used in the Guideline enhancement. Those Courts consult a dictionary to define the term and found that state law definitions of "controlled substance" define the term as

[1] There was no contention below that a modified categorical approach should be utilized.

it is used in Guideline enhancements. United States v. Ward, 972 F.3d 364, 371 (4th Cir.2020), United States v. Ruth, 966 F.3d 642, 652-54 (7th Cir. 2020), United States v. Henderson, 11 F.4th 713, 716, (8th Cir. 2021). The Second, Fifth, Ninth Circuits define the term "controlled substance" as a substance that is listed in the Controlled Substance Act (CSA) 21 U.S.C § 801 et. seq. United States v. Townsend, 897 F.3d 66, 71 (2nd Cir. 2018), United States v. Gomez-Alvarez, 781 F.3d 787, 793 (5th Cir. 2015), United States v. Bautista, 989 F.3d 698, 702 (9th Cir. 2021).

The Circuit Courts which define controlled substance by reference to the CSA utilize the version of the Act in effect at the time of the sentencing for the federal offense. Townsend, at 74, Gomez-Alverez at 796, Bautista, at 703, See also, United States v. Abdulaziz, 998 F.3d 519 (1st Cir. 2021)[2] (looking at federal law as it exists at the time of defendant's federal sentencing to determine the criteria that a potentially applicable federal sentencing enhancement uses to determine whether the enhancement must be applied at that sentencing).

Circuit Courts which define "controlled substance" by the ordinary

[2] Although the First Circuit stated in Crocco that it had not yet determined whether "controlled substance" is defined under state or federal law, the court in Abdulaziz assumed federal law controlled and held that federal law at the time of federal sentencing controlled the definition. Abdulaziz at 527.

meaning of the term "controlled substance" reference both the state law at the time of the predicate state conviction and state law at the time of the sentencing on the federal offense. Ward, at 371 (utilizes state law at time of sentencing on the federal offense), Ruth, at 654 (utilizes all state law offenses related to controlled substances), Henderson, at 718 (utilizes all state-law offenses related to controlled or counterfeit substances).

In the present case, Petitioner's 2012 Virginia conviction, under any definition of "controlled substance", utilized by any Circuit Court, was not a conviction for a "controlled substance offense".

If "controlled substance" is defined as those substances listed in the CSA, as it existed at the time of Petitioner's federal sentencing, Petitioner's 2012 Virginia conviction would not be a categorical match for the definition of "controlled substance" under the CSA. Under this methodology the Court's compare the controlled substances listed in the CSA, in place at the time of a Petitioner's sentence on his federal charges with the elements of Petitioner's statute of conviction. Petitioner was convicted under a Virginia statute which stated that it was "unlawful for any person to sell, give, distribute or possess with intent to sell, give, or distribute marijuana". Va. Code Ann. § 18.2-248.1 (2006). At the time of Petitioner's state conviction, Virginia included hemp in its definition of marijuana. Va. Code Ann. § 18.2-

247 (D) (2004); Johnson v. United States, 559 U.S. 133, 137 (20210) (under the categorical approach a court is to look to "the least of the acts" criminalized by the statute of conviction). Hemp is not a "controlled substance" listed in the CSA in effect at the time of Petitioner's sentencing. Agriculture Improvement Act, Pub. L. 115-334, 132 Stat. 4490 (the Act removed "hemp" from the schedule of controlled substances, specifying that "the term 'marihuana' does not include hemp). Thus, under this analysis, Petitioner's Virginia conviction is categorically broader than the definition of controlled substance in the CSA and the district court erred in applying the career offender enhancement. Descamps v. United States, 570 U.S. 254, 257 (2013) (under the categorical approach, a defendant's prior convictions qualify as controlled substance offenses "only if the statute's elements are the same as, or narrower than, those of the generic offense.").

If "controlled substance" is defined by state law as it existed at the time of Petitioner's state law conviction, Petitioner's 2012 Virginia conviction would not be a categorical match with "controlled substance" as defined by Virginia at the time of Petitioner's conviction. In 2012, Virginia did not include marijuana on its schedule of controlled substances. Va. Code § 54.1-3401.

> Prior to July 1, 1979, marijuana was a Schedule I controlled substance and penalties regarding its possession, sale, and other related

> offenses were contained in Code § 18.2-248. In 1979 General Assembly chose to treat marijuana offenses separately from other controlled-substance violations and accordingly added § 18.2-248.1 to the Code"). Ruplenas v. Commonwealth, 275 S.E. 2d 628, 630(Va.1981).

A "controlled substance" under Virginia law at the time of Petitioner's conviction was defined as a "drug, substance, or immediate precursor in Schedules I through VI." United States v. Ward, 972 F.3d at at 371. "Virginia Code § 18.2-247(A) specified that the term "controlled substances" refers to the Virginia Drug Control Act, 54.1-3400 et. seq." Id. 371, n. 7. Marijuana was not listed in the Virginia Drug Control Act and was not a "controlled substance" under Virginia law at the time of Petitioner's conviction. Under this analysis, Petitioner's Virginia marijuana conviction was not a conviction for a controlled substance offense as the term is defined by Virginia law at the time of Petitioner's Virginia conviction. Thus, it is not a categorical match for a "controlled substance offense" as used in the career offender enhancement. McNeill v. United States, 563 U.S. 519, 525 (2011) (compare the enhancement definition to the statute of prior conviction; every violation of statute must fit within the enhancement definition). The Court of Appeals declined to address this issue because "[I]t is not clear or obvious that the exact wording used by the state ("controlled substance" or otherwise) would control the inquiry." Crocco, at

24. But contrary to this contention it is crystal clear that "the exact wording" used by Virginia controls this issue. It could not be clearer that in 2012 Virginia did not consider marijuana a "controlled substance".

If "controlled substance" is defined by state law, as it existed at the time of Petitioner's federal sentencing, the Virginia conviction would not be a categorical match with controlled substance as defined by Virginia at the time of the federal sentencing. At the time of Petitioner's federal sentencing, the Virginia statute in effect legalized the possession of hemp. Va. Code Ann. § 18.2-247(D) (as amended by 2019 Va. Acts ch. 653) (in March of 2019, Virginia legislature exempted hemp from control "Marijuana does not include…a hemp product…containing tetrahydrocannabinol concentration of no greater than 0.3 percent."). Petitioner's statute of conviction criminalized the possession of hemp. Va. Code Ann. § 18.2-247.(D) (2004). Thus, Petitioner's 2012 Virginia conviction was broader than the state law in effect at the time of Petitioner's federal sentencing and not a categorical match. Descamps v. United States, 570 U.S. 254, 257 (2013). (under the categorical approach, a defendant's prior convictions qualify as controlled substance offenses "only if the statute's elements are the same as, or narrower than, those of the generic offense.").

The Court of Appeals refused to consider any of these arguments, reasoning that the law concerning the definition of "controlled substance" as defined by the career offender enhancement was unsettled. Crocco at 24,25. However, the fact that the definition of "controlled substance" was unsettled at the time of this appeal has no relevance to the present case. Under any definition of "controlled substance", in any Circuit Court, Petitioner's 2012 Virginia conviction was not a valid career offender predicate. This is a fact, not subject to reasonable dispute. Puckett v. United States, 556 U.S. 129, 135 (2009) (an error is plain if it is "clear or obvious, rather than subject to reasonable dispute). Therefore, it was "clear and obvious" that the district court erred when it sentenced Petitioner to as a career offender. Sindi V. El-Moslimany, 896 F.3d 1 (1st Cir.2018) (the answer to a legal question may be clear even without a precedent on all fours), citing, United States v. Morales, 801 F.3d 1, 10(1st Cir. 2015) (court may plainly err, even in the "absence of a decision directly on point."). An error is clear or obvious when it is obvious at the time of the appeal. Henderson v. United States, 568 U.S. 266 (2013) (an error is plain for the purpose of plain error review when it is plain at the time of appellate review). It affected Petitioner's substantial rights because the enhancement increased his guideline range. Molina-Martinez v. United States, 578 U.S.

189, 204 (2016). Leaving this error uncorrected would undermine the "fairness, integrity or public reputation of judicial proceedings" because the error increased Petitioner's actual term of imprisonment subjecting him, at a minimum, to an additional four years of imprisonment. Olano, 507 U.S. at 736. Thus, the Court of Appeals abused its discretion when it failed to recognize the plain error in the present case. Id. at 737 (discretion conferred by Rule 52(b) should be employed "in those circumstances in which a miscarriage of justice would otherwise result").

II. The Court of Appeals abused its discretion when it held that Petitioner's argument raised in his supplemental brief based on a case that court decided after argument in the present case, was waived.

Argument

The Court of Appeals accepts arguments raised for the first time in supplemental briefing under exceptional circumstances or when "justice so requires" United States v. Mayenndia-Blanco, 905 F.3d 26 (1st Cir.2081). Courts will reach an issue not raised in the opening brief where 1) the inadequately preserved argument is purely legal 2) the issue is amenable to resolution without additional factfinding 3) the issue is susceptible to resolution without causing undue prejudice 4) the argument is highly convincing 5) the issue is capable of repetition and 6) implicates matters of significant public concern. Id. at 33, citing Sindi v. El-Moslimany, 896 F.3d 1, 27-28 (1st Cir.2018). In the present case this standard is easily met and therefore the Court of Appeals erred when it failed to excuse forfeiture.

In the present case, in his opening brief Petitioner contested the applicability of his 2012 Virginia conviction as a predicate controlled substance offense for the purpose of imposing the career offender enhancement. Petitioner argued that his conviction was not a controlled substance offense. Crocco at 24. Petitioner refined his argument that his 2012 conviction was not a controlled substance offense in a supplemental

brief submitted after the First Circuit's decision in United States v. Abdulaziz, 998 F.3d 510 (1st Cir.2021), decided after oral argument in the present case. Abdulaziz, was the first case to opine that a previous state marijuana conviction was not a conviction for a "controlled substance offense" for the purpose of the career offender enhancement where the predicate state conviction criminalized for possession of hemp. Abdulaziz, at 523. Based on Abdulaziz, Petitioner filed a supplemental brief supplementing his previously raised argument that his 2012 conviction was not for a "controlled substance" and did not support a career offender designation. Crocco at 25.

Petitioner's argument raised in both his initial and supplemental brief are purely legal arguments, "amenable to resolution without additional fact finding." Sindi at 28. The argument turns of the definition of controlled substance as used in U.S.S.G. § 4B1.2(b) and does not require reference to any additional facts. Petitioner's arguments are highly convincing. Indeed, the First Circuit acknowledges as much repeatedly stating that Petitioner's marijuana conviction was most likely not a categorical match for the career offender enhancement. Crocco at 21, 23. ("for the reasons discussed below the District Court may have determined that Crocco's marijuana conviction

was not a categorical match under the federal CSA" and "these contentions have some purchase had they been timely raised")

Petitioner's arguments were capable of repetition. Sindi at 28 (the question we confront is virtually certain to be litigated in future cases—a factor that weighs in favor of reaching the merits.) In fact, the First Circuit in Crocco stated, "this scenario will doubtless arise in future cases" and because of that chose to discuss the issue extensively in its decision. 23-24. Petitioner's failure to raise in the initial brief was careless rather than deliberate. In fact, Petitioner cited to one of the cases in his initial brief United States v. Townsend, 897 F.3d 66 (2nd Cir. 2018), which supports the argument in his supplemental brief. Sindi, at 28 (to cinch matters, appellant's failure to develop arguments was careless rather than deliberate).

There is no threat of unfair prejudice to the government in considering Petitioner's argument. The government had the chance to address Petitioner's argument in both its initial brief and supplemental brief.

Here also there was intervening First Circuit case law, which wrought a substantial change in the career offender law. In Abdulaziz, decided after argument in Petitioner's case, the First Circuit found for the first-time that

"hemp was not a "controlled substance" within the meaning of 4B1.2(b) that was in effect at the time of defendant's sentencing. Abdulaziz, 998 F.3d at 531; See United States v. Vasquez-Rivera, 407 F.3d at 476 (1st Cir. 2005) (finding an issue raised only in supplemental brief not waived because "we are unwilling to ignore an important clarification of the law and perpetuate incorrect law, merely because a controlling case was decided after briefing and oral argument.")

Most importantly, Petitioner's argument raised in his supplemental brief implicated issues of significant public concern. As the Court in Crocco pointed out "The career-offender designation can have significant implications in setting the base guideline range—here, it raised Crocco's guideline range from 77-96 months to 210-240 months." Crocco at 24, n. 4. Even if Petitioner had been sentenced at the top of the non-career offender guideline range, his sentence would have been four years less than the nonguideline sentence he received. Thus, the equities in this case weighed heavily in favor of excusing waiver. "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." Hormel v, Helvering, 312 U.S. 552, 557 (1941)

III. There is a split in the Circuits on the question of whether any error can be plain or obvious if a circuit conflict exists on a question, and the law is unsettled in the circuit in which the appeal was taken. The Tenth Circuit holds that an error can be plain or obvious even where there a circuit conflict exists, and the law is unsettled in the circuit in which the appeal is taken. The First and Eleventh Circuits holds that an error can never be plain or obvious if there is a split in the circuits and the question is unsettled in the circuit in which the appeal is taken. This case is a perfect vehicle for addressing this issue.

Federal courts of appeals normally will not correct a legal error made in a criminal trial court proceedings unless the defendant first brought the error to the trial court's attention. Henderson v. United States, 568 U.S. 266, 268 (2013). An exception to that rule is Federal Rule of Criminal Procedure 52 (b) that says a plain error that affects substantial rights may be considered. Id. A plain error is an error that is clear or obvious. Olano, 507 U.S. 722 at 734 (1993). An error need not be clear or obvious at the time the lower court made the error. It is enough that the error is clear at the time of appellate consideration. Henderson at 279.

The First Circuit Court of Appeals holds that an error cannot be plain "if a question of law is unsettled in this circuit, and a conflict exists among other circuits." United States v. Lewis 963 F.3d 16, 27 (1st Cir. 2020). The

Tenth Circuit holds that an error can be plain even if "there are no Supreme Court or Tenth Circuit cases that have directly opined on the question. Indeed, even if there is a split among our sister circuits…that would not necessarily prevent us from concluding that…[there] was clear or obvious error." United States v. Titties, 852 F.3d 1257, 1272, n.19 (10th Cir.2017), quoting United States v. Madrid, 805 F.3d 1204, 1212 n. 10. (alterations in original). The Fourth, Fifth, Sixth and Eleventh Circuits agree with the First Circuit and hold that where there is a split in the circuits and the question of law is unsettled in the circuit in which the issue arose, there can be no plain error. United States v. Carthorne, 726 F.3d 503, 516-17 (4th Cir.2013), United States v. Salinas, 480 F.3d 750, 759 (5th Cir. 2007), United States v. Nelson, 276 F. App'x 420 (6th Cir. 2008), United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000). The Second Circuit agree with the Tenth and holds that there may be plain error even in the absence of circuit precedent and even where there is a split in the circuits, with the caveat that the error is "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite defendant's failure to object." United States v. Brown, 352 F.3d 654, 670 (2nd Cir. 2003).

The present case is a perfect example of why the Tenth Circuit's holding should prevail. In this case Petitioner, under any iteration of the

case law, should not have been sentenced as a career offender. It was plainly wrong for the district court to find that Petitioner's 2012 marijuana conviction was a "controlled substance" conviction under any definition of controlled substance. This error was 'clear' or 'obvious' even though the First Circuit had not yet fully addressed the issue and even though other circuit courts were split in their approach to the issue.

A hard and fast rule that there can be no plain error any time there is no precedent directly on point and a split in the circuits addressing the issue, unnecessarily restricts circuit court's authority to address plain error. See United States v. Goodwin, 625 Fed. Appx. 840(2015) ("We note that, where the question is one of statutory or regulatory interpretation, an error may be clear or obvious (that is plain) even if, as here, there are no Supreme Court of Tenth Circuit cases that have directly opined on the question" and "even if there is a split among our sister circuits"). This "sudden death principle" is fundamentally out of step with an appeals court's authority to correct error, "Indeed, we have said that a rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony

with…the rules of fundamental justice" Henderson, 568 U.S. at 272, quoting Olano, 507 U.S. at 732 (internal quotations omitted).

This Court should take this opportunity to address the split in the circuits and find that an error may be plain even where there is no precedent on point and there exists a split in the circuit courts addressing the issue.

CONCLUSION

For the above reasons, this Court should grant the Petition for a Writ of Certiorari.

Dated at Portland, Maine this 24 day of February 2022.

____/s/Jane E. Lee_____

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APPENDIX